IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted]

BENJAMIN BLIER,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
TABLE OF CITATIONS	ii
OPINIONS OF COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF CASE	2
REASONS FOR ALLOWANCE OF THE WRIT	4
POINT I—The opinion of the United States Court of Appeals for the Second Circuit is in direct conflict with the Supreme Court opinion of *Mitchell* v. *Trawler "Racer", Inc.* because it seeks to subvert the major ruling in that case	5
POINT II—The opinion of the United States Court of Appeals for the Second Circuit on the question of "transitory unseaworthiness" is in direct conflict with opinions on the same subject made by the United States Court of Appeals for the Fourth Circuit	8
POINT III—The opinion of the United States Court of Appeals for the Second Circuit sustaining the District Court's charge to the jury is in direct conflict with the Supreme Court's opinion in the case of *McCallister* v. *Magnolia Petroleum Company*	11
CONCLUSION	15

TABLE OF CITATIONS OF DECISIONS.

PAGE

Alaska Steamship Company vs. *Petterson*, 347 U. S. 396 (1954) 9

Grzbowski vs. *Arrow Barge Co. Inc.*, (4th Cir. 1960) 283 F. 2d 481 9

McCallister vs. *Magnolia Petroleum Company*, 357 U. S. 221 (1958) 2, 11, 12

Mitchell vs. *The Trawler "Racer" Inc.*, 362 U. S. 539 (1960) 6, 7, 8, 9

Poignant vs. *United States of America*, (2nd Cir.) 225 F. 2d 595 (1955) 8

Puerto Seguro Cia, Naviera vs. *Pettsilos*, (4th Cir. 1960) 279 F. 2d 599 9

Index to Appendix.

Opinion of Court of Appeals for the Second Circuit 1a

Charge on Unseaworthiness 11a

Exceptions to Charge 12a

Defendant's Request to Charge 13a

IN THE

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OCTOBER TERM, 1960.

No.

BENJAMIN BLIER,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, an American Merchant Seaman and Plaintiff-Appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below.

There was no opinion by the trial court, the United States District Court for the Southern District of New York (Dimock, D. J.), sitting at law, upon the motion to set aside the jury verdict for defendant and grant a new trial. The District Court's Charge to the jury on unseaworthiness is at "A"

The opinion of the United States Court of Appeals for the Second Circuit (Medina, P. J., Friendly and Smith) the opinion is reported in 286 F. 2d 920 and is printed herein at page 1a.

Jurisdiction.

The decision and judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on February 17, 1961.

This cause was brought under the "Jones Act" (Title 46 U. S. C. A. Section 688) and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by Title 28 U. S. C. A. Sections 1254(1), 2101(c) and 2106.

Questions Presented.

1. The opinion of the United States Court of Appeals for the Second Circuit is in direct conflict with the Supreme Court opinion of *Mitchell* v. *Trawler "Racer" Inc.* because it seeks to subvert the major ruling in that case.

2. The opinion of the United States Court of Appeals for the Second Circuit on the question of "Transitory Unseaworthiness" is in direct conflict with opinions on the same subject made by the United States Court of Appeals for the Fourth Circuit.

3. The opinion of the United States Court of Appeals for the Second Circuit sustaining the District Court's charge to the jury is in direct conflict with the Supreme Court's opinion in the case of *McCallister* v. *Magnolia Petroleum Company.*

Statement of the Case.

The plaintiff, Benjamin Blier, a Seaman Purser, was employed on board the defendant's vessel the SS. *American*

Leader. On May 30, 1957 the vessel arrived at the Port of New York from a foreign voyage and dropped its anchor at the Stapleton anchorage. The plaintiff obtained permission to leave the vessel and go ashore. He went ashore to his home the night of May 30-31st, 1957 and returned to the dock where the vessel was docked, namely, Pier 59, North River, shortly before 8:00 A. M. on May 31, 1957.

Plaintiff stood on the dock and watched the vessel being berthed. After the vessel was secured a three-piece or 3-section gangway for this type of freighter vessel, commonly called a West Coast C-2, was rigged into place by a shore gang employed by defendant. The first section was a large straight section which ran up to the side of the ship just below the bulkwarks. The second section consisted of a ladder which hooked over the bulwarks and ran down to the top of the first section, and the third section was a series of five wooden steps with a railing which permitted a seaman to go from the top of the bulwarks down these steps to the main deck. It was on these wooden steps that the plaintiff sustained his injury.

As he testified at the trial and at his deposition, he claimed to have slipped on a large smear of grease on the second or third steps and skidded down the gangway twisting his right ankle. He subsequently, and this was verified by the defendant's own witnesses, was seen by the Master hobbling around shortly after he entered upon the vessel and directed by the Master to depart the vessel and receive medical treatment. He departed the vessel and received medical treatment on the dock where his condition was diagnosed as a fracture of the right ankle, and he was directed to go to the U. S. P. H. S. Hospital as an outpatient at 67 Hudson Street, New York City. There his leg was placed in a cast and he received outpatient treatment for some 9 weeks, and subsequently returned to the defend-

ant's employ as a Purser Baggagemaster on board the SS. *America.*

This action was tried on May 2 to 4, 1960, before the Hon. Edward F. Dimock, Judge of the U. S. District Court, Southern District of New York and a jury. At the termination of this trial the jury returned with a verdict for the defendant with no special findings of fact.

The plaintiff claimed during the trial through himself and a witness that there was grease present on the third section of the gangway, and that this grease was the proximate cause of his injury.

The defendant contended through its witnesses that the grease was not present, and even if it was present the defendant did not have adequate time to apprise itself of the presence of this grease either actually or constructively and therefore this grease only constituted a temporary unseaworthy condition which in and of itself would not make the defendant liable for plaintiff's injury.

The plaintiff was therefore entitled to a charge on both Negligence and Unseaworthiness. The Court charged that the vessel was not liable for a "Temporary Condition of Unseaworthiness"; which charge when examined in the light of the very elements of this case, a fall on grease on a gangway, is the equivalent of *an abject failure to charge unseaworthiness.* It is from this point of error committed in the "Judge's charge" that this appeal is taken.

On February 17, 1961 the United States Court of Appeals for the Second Circuit rendered an opinion sustaining the validity of a charge on Unseaworthiness, (Dimock D. J. May 4, 1960) it is from this part of the charge that petitioner applies for a writ of certiorari.

POINT I.

The opinion of the United States Court of Appeals for the Second Circuit is in direct conflict with the Supreme Court opinion of *Mitchell* v. *Trawler "Racer" Inc.* because it seeks to subvert the major ruling in that case.

Plaintiff-appellant petitions for a Writ of Certiorari, requesting review of an improper charge by a trial judge in the Southern District of New York, and from an opinion of the United States Court of Appeals for the Second Circuit, decided February 17th, 1961 which affirms the trial court's charge and resultant jury verdict in favor of the defendant.

The major reason for requesting this writ is because the two above rulings affect the rights, under the warranty of seaworthiness, of all maritime workers who labor within the jurisdiction of the Second Circuit Court of Appeals. The above ruling places a far greater burden upon the aforesaid class of individuals than would be theirs if they brought their action by virtue of the warranty of seaworthiness, in any other circuit.

The maritime worker, generally speaking, has two separate rights of action, (a) under negligence, be it Jones Act or comparative negligence, and (b) the warranty of seaworthiness under the General Maritime Law.

The above ruling, for which this writ is requested, would affect the warranty to such a great extent that, in many cases, it would nullify the maritime workers' rights completely.

This Court has, just recently, on May 16th, 1960 brought forth a very important point of law which terminated the entire fallacious doctrine of transitory unseaworthiness which has plagued the rights of maritime workers, under

the warranty of seaworthiness, in this circuit for the past ten years.

The Second Circuit Court of Appeals, by its opinion in our instant case, seeks to return this outlawed doctrine to this circuit.

The Second Circuit Court of Appeals, in our instant case seeks, by its opinion, to evade, qualify and thereby destroy, the effects of this Court's ruling in *Mitchell* vs. *The Trawler Racer,* 362 U. S. 539 by permitting a trial judge to charge "Temporary Unseaworthiness" to a jury. This intention, on the part of this Circuit, is indicated by Judge Medina's opinion on page 925, when he states as follows:

> "True it is that the Supreme Court in Mitchell held the duty with respect to seaworthy conditions is no 'less with respect to an unseaworthy condition which may be only *temporary*' 362 U. S. Page 549, but the mere use of the word '*temporary*' in Judge Dimock's instructions, cannot fairly be construed to mean that the rule applicable to a permanent condition is a different one. The plain fact is that the case did involve a temporary condition and not a permanent one, and it was natural and proper to instruct the jury on the subject of the shipowner's duty as applicable to the case in hand."

On page 924 of the same opinion, Judge Medina sets forth what he considers to be a proper charge in a case involving unseaworthiness created by grease or oil, or other similar substances.

> "We would then conclude that, in order to follow Mitchell, in the absence of the submission of some specific request for instructions based upon the proofs adduced by the parties in a particular case, the trial judge that, where the claim is based on an

> alleged *temporary condition of unseaworthiness*, they can find for the plaintiff on the issue of unseaworthiness only if they find that the *temporary condition* in fact existed, and that it was the proximate cause of plaintiff's injury, and that the shipowner had not furnished and maintained a vessel and appurtenances reasonably fit for their intended use."

This proposed charge, and the preceding excerpt from Judge Medina's opinion, are not in conformity with *Mitchell, supra,* which holds as follows on page 549:

> "There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after a vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska SS Co. *vs.* Petterson Supra. In that case the court affirmed a judgment holding the ship owner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. The decision is thus specific authority for the proposition that the ship owners' actual or constructive knowledge of the unseaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that *liability for a temporary unseaworthy condition is different from a liability that attaches when* a condition is permanent."

The practical effect of Judge Medina's opinion is that it would continue to permit a trial judge to indicate that a distinction exists insofar as liability for unseaworthiness is concerned, between the temporary and permanent conditions. What other reason could the Second Circuit Court of Appeals have for permitting the phrase "temporary

condition of unseaworthiness" to be charged to a jury than to indicate what has just been previously stated.

There are no longer any degrees of unseaworthiness under *Mitchell, supra,* either a condition amounts to unseaworthiness or it does not, one condition is no more and the other no less an unseaworthy condition because of its origin.

POINT II.

The opinion of the United States Court of Appeals for the Second Circuit on the question of "transitory unseaworthiness" is in direct conflict with opinions on the same subject made by the United States Court of Appeals for the Fourth Circuit.

It is petitioner's contention, in our instant case, that the Trial Court's entire charge to the jury on unseaworthiness becomes a nullity because it would tend to raise a question in the jurors' minds that a distinction exists within the law on unseaworthiness, between temporary and permanent conditions of unseaworthiness. The charge specifically complained of is as follows:

> "A vessel is not unseaworthy by reason of a temporary condition if, even so, the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put."

This charge was adopted from the case of *Poignant* vs. *United States,* 225 F. 2d 595 which reads as follows on page 598:

> "A vessel does not become unseaworthy by reason of a temporary condition caused by a transient

> substance such as grease or oil, if even so, the vessel was as fit for service as similar vessels in similar service."

The Fourth Circuit Court of Appeals in the case of *Grzbowski* vs. *Arrow Barge Co., Inc.*, 283 F. 2d 481 found that the following charge to a jury was improper on page 486.

> "The doctrine of unseaworthiness does not extend so far as to require the owner to keep the appliance or work spaces which are inherently sound and seaworthy absolutely free at all times from transitory, occasional, immediate unsafe conditions resulting from their use."

In our instant case, the claim of unseaworthiness involved the presence of grease on the gangway, in *Grzbowski* the claim also involved a similar substance on the deck of a vessel's lower hold.

The charge in *Grzbowski* was found to be improper by the Fourth Circuit Court of Appeals because it conflicted with the ruling in *Mitchell*, abolishing the distinction between temporary and permanent conditions of unseaworthiness.

In the case of *Puerto Seguro Cia Naviera S. A.* vs. *Petros Pittsilos*, 279 F. 2d 599, the Fourth Circuit Court of Appeals lays at rest the fallacious doctrine of transitory unseaworthiness when it reiterates the holding of *Mitchell, supra* in the opinion as follows on page 600:

> "The transistory unseaworthiness doctrine has been laid to rest by the Supreme Court's square holding that 'the ship owners' actual or constructive knowledge of the unseaworthy condition' is not essential to his liability, and that Alaska SS Co. *vs.* Petterson, 347 U. S. 396, effectively disposes of the

> suggestion that liability for a temporary condition is different from the liability that attaches when the condition is permanent."

The Fourth Circuit Court of Appeals feels that transitory unseaworthiness is dead. This is completely the opposite viewpoint than that of Judge Medina who states on Page 923:

> "As the Supreme Court has spoken, we need not concern ourselves with the origin or development of the doctrine of transitory unseaworthiness up to this point. Obviously, the doctrine has grown and prospered since we decided Dixon 1955. But what of the future? It is not likely the last word has yet been written on the subject of the liability of a ship owner for a temporary condition of unseaworthiness."

On one hand, we have our Second Circuit Court of Appeals' opinion indicating that transitory unseaworthiness is still very much alive. On the other hand, we have two Fourth Circuit Court of Appeals' opinions announcing and affirming the demise of this doctrine. The practical effect of these differences on the trial of any action involving unseaworthiness in the Second Circuit Court would be to permit a trial judge to continue using the words "temporary condition of unseaworthiness" in his charge to the jury on a point involving the presence of, for example, grease and oil, while a Fourth Circuit Court trial judge would be barred from charging in the same manner in the same type of case.

The above inconsistencies would exist because Judge Medina seems to think that the use by a trial court in a case involving similar factors, as our instant one, of the adjective "Temporary" as designating a type of unseaworthy condition, is of no moment.

Petitioner feels the use of this language is of immediate relevancy because, under Mitchell an appurtenance or appliance is either seaworthy or it is not. The use of the word "Temporary" carries a connotation of time, and time is the basic element of negligence; as this Court has ruled, these factors have absolutely no bearing upon unseaworthiness, because unseaworthiness is never to be bound by the requirements of negligence.

POINT III.

The opinion of the United States Court of Appeals for the Second Circuit sustaining the District Court's charge to the jury is in direct conflict with the Supreme Court's opinion in the case of *McCallister* v. *Magnolia Petroleum Company.*

In the instant case, the Trial Court charged that the following is an explanation of the term "*unseaworthy*".

> "First I will try to explain to you the term 'unseaworthiness'. The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury.
>
> "In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:
>
> "A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a

> vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put."

In the case of *McCallister* vs. *Magnolia Petroleum Co.*, 357 U. S. 221, a similar charge as the one which the petitioner questioned, was thoroughly scrutinized by this very Court. The following opinion was written on this case as a result of this Court's examination of the charge in the *McCallister* case on pages 226, 227;

> "We think that the charges set out in the margin[8] were erroneous:
>
> "They carried the incorrect implication that petitioner could recover for unseaworthiness only if the defect was of such quality that it rendered the whole vessel unfit for the purpose for which it was intended.[9]
>
> "It is well settled that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment."

---

[8] "Special Issue 3 (and 14). Do you find from a preponderance of the evidence that the portholes or windows in question (or the 'deck above the galley') not being in a watertight condition, if you have so found in answer to a special issue No. 2 (or No. 13), made the whole ship in question 'unseaworthy', as defined herein?

"You are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purpose for which it is being used."

[9] "The jurors were puzzled over the meaning of this charge. A short time after retiring to the jury room they made the following inquiry of the trial judge: 'In special issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?' Plaintiff thereupon requested the trial judge to instruct the jury that the term meant that "the portholes and their fittings are not fit for the purpose for which such portholes are used." The court declined to instruct the jury further and answered their request by referring them to the definition in his charge, presumably the one quoted in note 8, supra."

In examining the charge in our instant case, Petitioner has recognized language similar to the charge in the *McCallister* case on unseaworthiness. This language results in the same confusion as did the charge in *McCallister*. It tends to make a jury feel that in order to find unseaworthiness present in any case, the entire vessel has to be unseaworthy rather than a particular appliance.

At the end of the trial, Petitioner made a formal request to the Court for a more detailed explanation of unseaworthiness, directed specifically to the particular appurtenance from which the claim arose, because the charge seemed to be ambiguous in character. The following colloquy took place on the record.

> "The Court: Have you any exceptions?
>
> Mr. Heller: No exceptions, but I would just like to point out, would you please elucidate and give some examples of unseaworthiness, that the vessel should provide a safe place to walk, in addition to a safe place to work.
>
> The Court: They would think that a man was working when he was walking.
>
> Mr. Heller: That is a thought that struck me: he was walking to work.
>
> The Court: I don't think that I ought to add anything further. It seems to me that is clear enough.
>
> Mr. Heller: What about some examples of unseaworthiness? The jury might be of the opinion that unseaworthiness means only that a ship has not got a good hull or a good mast.
>
> The Court: No. They would know that I would not have submitted the matter to them if there was not a question of unseaworthiness. *I will give you an exception to both of your requests.*
>
> Mr. Heller: No examples of unseaworthiness?"

The above part of the record appears in Respondent's Brief and Appendix and the Court of Appeals for the Second Circuit reviewed it, but thought it had no merit. Nevertheless, Judge Medina stated as follows on page 921:

> "The case was submitted to the jury, in a charge to which Plaintiff's counsel *took no exceptions* and with respect to which he expressed satisfaction, except that he expressed the thought that it might be helpful to the jury if the Trial Judge saw fit to give the jury some examples of unseaworthiness. No exception or objection was noted when the Trial Judge refused to do this, and the jury rendered a general verdict for Defendant."

Judge Medina was mistaken, because Trial Court did give petitioner exceptions to these requests.

The type of general charge on unseaworthiness which covers, but does not explain unseaworthiness, with reference to the specific part of the vessel from which the claim arose, always leaves the impression in the jury's minds, as stated by this Court in *McCallister*, that the entire vessel and not merely a part, has to be unseaworthy, before a verdict can be returned. In our instant case, counsel for the Petitioner tried to clarify the very points which were considered in *McCallister*, and as in that case, his request was denied.

Conclusion.

For all of the reasons a writ of certiorari as prayed for should be granted.

Respectfully submitted,

MILTON GARBER,
Counsel for Petitioner,
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Hoboken, New Jersey.

KENNETH HELLER,
Of Counsel.

Dated New York, N. Y.
May 18, 1961.

APPENDIX.

Opinion of U. S. Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 187—October Term, 1960.

(Argued January 19, 1961 Decided February 17, 1961.)
Docket No. 26357

BENJAMIN BLIER,
Plaintiff-Appellant,

against

UNITED STATES LINES COMPANY,
Defendant-Appellee.

Before:

MEDINA, FRIENDLY and SMITH,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge.*

Plaintiff appeals from a judgment entered upon a jury verdict for defendant in an action for the recovery of damages for personal injuries, based on alleged unseaworthiness of the vessel on which plaintiff was employed as a seaman purser, and on negligence under the Jones Act, 46 U. S. C. Section 688. No opinion below. Affirmed.

KENNETH HELLER, New York, N. Y., for plaintiff-appellant.

WILLIAM R. MACKEY, New York, N. Y. (Louis J. Gusmano, and Kirlin, Campbell & Keating, New York, N. Y., on the brief), for defendant-appellee.

MEDINA, *Circuit Judge:*

Benjamin Blier was employed as a seaman purser on the vessel SS *American Leader,* owned by Defendant United States Lines Company, and he was injured on May 31, 1957 as he was boarding the vessel on his return from shore leave. The *American Leader,* having arrived from a foreign port, was at anchor in the Port of New York, at the Stapleton anchorage. Blier's version of the accident was that the third section of a three-piece gangway, rigged into place by a shore gang employed by defendant, provided a series of five wooden steps leading from the top of the bulwarks of the vessel to the main deck, and that as he came down these steps he slipped "on a large smear of grease on the second or third steps and skidded down the gangway twisting his right ankle." The claim for recovery was based on the familiar double aspect of unseaworthiness under the general maritime law and negligence under the Jones Act, 46 U. S. C. Section 688. The proofs adduced by the shipowner tended to establish that there was no grease on the steps and that the shipowner had no notice of the presence of any grease on the steps. The case was submitted to the jury, in a charge to which plaintiff's counsel took no exceptions and with respect to which he expressed satisfaction, except that he expressed the thought that it might be helpful to the jury if the trial judge saw fit to give the jury some examples of unseaworthiness. No exception or objection was noted when the trial judge refused to do this, and the jury rendered a general verdict for defendant. Plaintiff appeals.

We are urged to reverse on the ground that Judge Dimock is said to have instructed the jury that "a vessel does not become unseaworthy because of a temporary condition of unseaworthiness"; that his instructions were such as to require a finding for defendant on the unseaworthiness count, unless the jury found defendant had notice of the existence of such a "temporary unseaworthy condition"; that the rule thus alleged to have been applied by Judge Dimock had been "closely adhered to by this circuit right down to and including the case of *Poignant* v. *United States*, 1955, 225 F. 2d 595," and the dictum of Judge Byers in *Pierce* v. *Erie R.R., et al.*, 1959, 264 F. 2d 136, at page 139; and that this rule had been overturned and repudiated as bad law by the Supreme Court in its recent decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, decided on May 16, 1960, just twelve days after the rendition of the verdict in this case. If these assertions were correct we might well have given serious consideration to appellant's contention that the trial judge had committed "fundamental error." In such a case we clearly have power to decide on the whole trial record whether the likelihood of a miscarriage of justice is such as to warrant a review of the "error" even in the absence of objection or exception at the trial. See *Hormel* v. *Helvering*, 1941, 312 U. S. 552, 557; *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 2 Cir., 1956, 234 F. 2d 253; *Thorp* v. *American Aviation and General Ins. Co.*, 3 Cir., 1954, 212 F. 2d 821, 824-25; *Massachusetts Bonding & Ins. Co.* v. *Ray Dilschneider, Inc.*, 8 Cir., 1953, 203 F. 2d 556, 560; *Smith* v. *Welch*, 10 Cir., 1951, 189 F. 2d 832, 836-37; *Dowell, Inc.* v. *Jowers*, 5 Cir., 1948, 166 F. 2d 214; *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama, D. C.* Cir., 1944, 140 F. 2d 13; 5 Moore, Federal Practice, Para. 5104, at 2503-04.

We find, however, that Judge Dimock's instructions to the jury were wholly unexceptionable, that they are in strict conformity with the teaching of *Mitchell* and that

appellant has misunderstood the course of decision in this Circuit concerning the doctrine of seaworthiness as applied to temporary conditions arising after the commencement of the voyage. We shall, accordingly, briefly comment on the point decided in *Mitchell,* on the effect of this decision on rulings made by us in *Poignant* and other cases, and on the instructions actually given by Judge Dimock.

The development in the Circuit of principles of law governing the liability of a shipowner for unseaworthiness, caused by a temporary or transitory condition that arose after the commencement of the voyage, is illustrated and illuminated by the fine opinion of our brother, the then Judge Harlan, in *Dixon* v. *United States,* 2 Cir., 1955, 219 F. 2d 10. Two lines of decisions developed in the course of time relating to slippery conditions on stairways, passageways and other places on shipboard caused by grease, vegetable matter or other similar substances. A common feature of these cases and the one now before us is, there are numerous ways in which the slippery substance might have been placed where it was and very little the shipowner could do about it unless he had some notice of the existence of the condition. The Third Circuit held there was no liability for unseaworthiness caused by such a temporary condition, in the absence of some proof that the shipowner knew of the condition, and had an opportunity to remedy it. *Cookingham* v. *United States,* 3 Cir., 1950, 184 F. 2d 213. In that case a ship's cook had slipped on some Jello on a stairway. In *Poignant,* where a stewardess slipped on a piece of apple peel in a passageway leading to the dining room, we held the question of seaworthiness was one of fact to be decided by the trier of the facts, even in the absence of proof that the shipowner had notice of the condition and an opportunity to remedy it, and the Ninth Circuit took the same position in *Johnson Line* v. *Maloney,* 1957, 243 F. 2d 293. Finally, the view that there could be liability for a temporary condition of un-

seaworthiness, in the absence of any fault on the part of the shipowner, was "impressively challenged by Chief Judge Magruder's opinion,"[1] writing for the First Circuit in *Mitchell*, 1 Cir., 1959, 265 F. 2d 426. There a member of the crew of a fishing trawler slipped on some slime and fish gurry on the rail of the trawler as he was going ashore. The slime and fish gurry had remained on the rail after the earlier unloading of the catch. The record in *Mitchell* presented in the clearest possible way the question of whether the shipowner could be held liable for damages caused by a temporary condition of unseaworthiness, in the absence of any fault on his part, as the trial judge specifically instructed the jury that they could not find for the plaintiff on the unseaworthiness count unless they also found as a fact "that the slime and gurry had been on the ship's rail for a period of time long enough for the respondent (shipowner) to have learned about it and to have removed it." Exception was taken to this instruction and it was the basis for the reversal by the Supreme Court. Thus the shipowner's liability for unseaworthiness was held not to be limited by concepts of common law negligence. As the Supreme Court has spoken, we need not concern ourselves with the origin or the development of the doctrine of transitory unseaworthiness up to this point. Obviously, the doctrine has grown and prospered since we decided *Dixon* in 1955. But what of the future? It is not likely the last word has yet been written on the subject of the liability of the shipowner for a temporary condition of unseaworthiness.

Appellant seems to think that all the seaman must establish to warrant a recovery in this case is that there was grease on the gangway and that he slipped on that grease and was injured. In effect he says: grease is slippery, and, if grease was on the gangway and appellant slipped

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[1] See dissent of Mr. Justice Frankfurter in *Mitchell*, 362 U. S. at 550.

on it, he is *ipso facto* entitled to recover, as the vessel must have been unseaworthy. But the teaching of *Mitchell* is merely that there must be and is a "complete divorcement of unseaworthiness liability from concepts of negligence," and that the duty of the the shipowner is not "to furnish an accident-free ship," but "only to furnish a vessel and appurtenances reasonably fit for their intended use," and the case was remanded for a new trial on the issue of unseaworthiness on this basis.

Where does *Poignant* fit into this framework? In *Mitchell* Mr. Justice Harlan, in his separate dissenting opinion, calls attention to the fact that in *Poignant* the vessel lacked garbage chutes and the garbage was pulled, in cans, through the passageway where Poignant fell, to a railing, where it was jettisoned. He adds (362 U. S. at pp. 570-71):

> "The Court of Appeals first expressed the view that any unseaworthy condition which existed had in all probability arisen after the voyage had commenced. It said, much as the Court now holds, that *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396, required it to apply a rule of absolute liability nonetheless. It then put, as the critical issue, the question whether the presence of some garbage in a public passageway constituted an unseaworthy condition, and, finding the matter to turn on an issue of fact, remanded the case for trial. However, it is important to note the manner in which the court dealt with the problem. Although at the outset of the opinion the allegedly unseaworthy condition was assumed to be the presence of garbage in a passageway, 225 F. 2d, at 597, the remand was *in fact* directed to the question whether the absence of garbage chutes rendered the vessel not reasonably fit for the voyage, and therefore unseaworthy. Id., at 598. This, of course, would be a condition going to the proper outfitting of the

vessel for sea travel, and a clear case of initial unseaworthiness. In such event, the injury would have been the proximate result of that unseaworthiness, for it was by reason of the lack of chutes that garbage was carried through the passageways at all." (Emphasis that of Mr. Justice Harlan.)

The statement in *Poignant* on the subject of the remand, and the new trial, is (225 F. 2d at pp. 598-9):

> "Since the dismissal of the claim based on alleged unseaworthiness was not required by the bare facts stated in the findings below, it becomes necessary to consider whether there was sufficient evidence on this issue to raise questions of fact which only the trial judge can resolve. As to this, there was some testimony tending to support possible inferences (1) that the absence of garbage chutes on the vessel was the proximate cause of the accident and (2) that comparable vessels generally are provided with such chutes. Especially since this testimony involves questions of credibility, its weight and any inferences which it may, or may not, require are matters for determination by the trial judge.
>
> Reversed and remanded for retrial on the issue of unseaworthiness."

The concurring opinion of Judge Frank would seem to indicate that he understood the holding of the Court to be in more general terms, and not limited to the question of unseaworthiness based upon the absence of garbage chutes and proof that other similar vessels were equipped with garbage chutes. But we cannot be sure of this, and the subject is not relevant in any event, in view of the holding of the Supreme Court in *Mitchell*. We would then conclude that, in order to follow *Mitchell*, in the absence of the submission of some specific request for instructions based upon the proofs adduced by the parties in a partic-

ular case, a trial judge should instruct the jury that, where the claim is based upon an alleged temporary condition of unseaworthiness, they can find for the plaintiff on the issue of unseaworthiness only if they find that the temporary condition in fact existed, that it was the proximate cause of plaintiff's injuries, and that the shipowner had not furnished and maintained a vessel and appurtenances reasonably fit for their intended use. And this is precisely what Judge Dimock did. His complete instructions on the subjects of unseaworthiness and negligence follow:

> "First I will try to explain to you the term 'unseaworthiness'. The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions, Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury.
>
> In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:
>
> A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put.
>
> If you do decide that the vessel was unseaworthy, then its liability is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that the defendant knew that the steps would be used when such grease was on there. You will remember that the plaintiff also claims recovery on the ground that

the defendant was negligent in that its employees failed to remove grease from the steps on which he was allegedly injured.

I shall try to explain to you what the term 'negligence' means.

In its relation to the plaintiff the defendant had a duty to exercise through its employees ordinary care. Ordinary care is that which would be the conduct of a reasonable and prudent person under similar circumstances. It is a breach of that duty of ordinary care if defendant's employees conducted themselves either through action or failure to act in such a manner as to create a risk of injury to the plaintiff which a reasonable and prudent person would have anticipated and guarded against under similar circumstances.

If you find that acts of employees of the defendant, or failure to act, created a risk of harm to the plaintiff which reasonable persons similarly situated would have anticipated and guarded against, that would mean that you find the defendant negligent.

In this connection you must decide whether any grease which was on the steps had been there long enough so that reasonable persons would have discovered it and removed it.

You are not to guess or to speculate as to whether the ship was unseaworthy or the defendant was negligent, nor can you regard the mere fact of the accident as a basis for finding the defendant responsible. Your determination must be based upon facts or reasonable inferences from facts.

It is important for you to bear in mind that a finding of unseaworthiness of the vessel or negligence of the defendant without more is not enough to hold the defendant liable in damages.

Its liability also depends on whether the unseaworthiness or negligence was a proximate cause of

> injury. To be a proximate cause there must be a direct causal connection between the unseaworthiness or negligence and the injury. In other words, there must be an unbroken chain of events flowing from the unseaworthiness or negligence and leading to the injury. Assuming that you found the vessel unseaworthy or the defendant negligent, you must then decide whether there was this causal connection between the unseaworthiness or negligence and injury to the plaintiff."

Nor do we find any inconsistency between the instructions thus given by Judge Dimock and the dictum in *Pierce*, *supra*. In that case the court was dealing with a third party claim that had been reserved for decision after the conclusion of the trial of the issue of unseaworthiness between a longshoreman, who was injured when he slipped on an oil or grease spot, and the owner of the lighter on which the longshoreman slipped. In the posture of the case in this Court there was no occasion to review the finding of unseaworthiness for reasons stated in the opinion. The dictum relied upon by appellant is as follows (264 F. 2d at p. 139):

> "The decision here to be made is so straitly confined that it must be apparent that there is no present holding that the presence of an oil spot on the deck of a vessel renders the latter unseaworthy, *ipso facto*. If the issue were here open to review, all attendant circumstances would require careful analysis and consideration. Cf. Poignant *v.* U. S., 2 Cir., 225 F. 2d 595 and Ross *v.* The Zeeland, 4 Cir., 240 F. 2d 820."

This appears to us to do no more than state what is implicit in the holding of the Supreme Court in *Mitchell*. True it is that the Supreme Court in *Mitchell* held the duty with respect to seaworthy conditions is no "less with respect

to an unseaworthy condition which may be only temporary." 362 U. S. at p. 549. But the mere use of the word "temporary" in Judge Dimock's instructions cannot fairly be construed to mean that the rule applicable to a permanent condition is a different one. The plain fact is that the case did involve a temporary condition and not a permanent one, and it was natural and proper to instruct the jury on the subject of the shipowner's duty as applicable to the case in hand. The reason for the reversal in *Grzybowski* v. *Arrow Barge Co.*, 4 Cir., 1960, 283 F. 2d 481, was that the trial judge made certain remarks to the jury which failed to measure up to the requirement that unseaworthiness liability be completely divorced "from concepts of negligence."

Thus we hold the instructions as given to the jury by Judge Dimock were in all respects correct. How the jury, if it found there was a smear of grease on one of the steps of the gangway, was to or did determine the question of seaworthiness is matter of speculation, just as we are never sure how the jury decides the issue of what the theoretical reasonable man would or should do or refrain from doing in a given set of circumstances.

Affirmed.

The Court's Charge on Unseaworthiness.

First I will try to explain to you the term "unseaworthiness". The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury.

In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:

Exceptions to Charge.

A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put.

If you do decide that the vessel was unseaworthy, then its liability is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that the defendant knew that the steps would be used when such grease was on there. You will remember that the plaintiff also claims recovery on the ground that the defendant was negligent in that its employees failed to remove grease from the steps on which he was allegedly injured.

• • • • • •

(italics mine)

Exceptions to Charge.

The Court: Have you any exceptions?

Mr. Heller: No exceptions, but I just would like to point out will you please elucidate and give some examples of unseaworthiness, that the vessel should provide a safe place to walk, in addition to a safe place to work.

The Court: They would think that the man was working when he was walking.

Mr. Heller: That is the thought that struck me; he was walking to his work.

The Court: I don't think that I ought to add anything further; it seems to me that that is clear enough.

Mr. Heller: What about some examples of unseaworthiness? The jury might be of the opinion that unseaworthiness means only that a ship has not got a good hull or a good mast.

The Court: No. They would know that I would not have submitted the matter to them if there was not a ques-

tion of unseaworthiness. I will give you an exception to both of your requests.

Mr. Heller: No examples of unseaworthiness?

Mr. Mackey: No exceptions, your Honor.

• • • • • •

Defendant's Request to Charge.

• • • • • •

14. A vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance such as grease or oil, if even so, the vessel was as fit for service as similar vessels in similar service. *Poignant* v. *United States of America, supra.*

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Supreme Court of the United States

OCTOBER TERM, 1960.

No. [redacted]. 76

BENJAMIN BLIER,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

BRIEF OF RESPONDENT, UNITED STATES LINES COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS.

PAGE

POINT I.—The opinion of the United States Court of Appeals for the second circuit is not in conflict with this court's opinion in *Mitchell* v. *Trawler Racer Inc.* The trial judge correctly charged the jury on unseaworthiness in strict conformity with the Mitchell decision, including a charge that the duty is an absolute one and did not depend on defendant's notice of the grease. Petitioner made no objection to the charge 3

POINT II.—The decision of the Court of Appeals for the Second Circuit is not in conflict with the decisions of other Courts of Appeal 6

Conclusion 7

APPENDIX.

Charge of the Court 1a

Table of Cases.

	PAGE
Grzybowski v. *Arrow Barge Co. Inc.* (4 Cir. 1960), 283 F. 2d 481	6
Johnson v. *New York N. H. & H. R. Co.*, 344 U. S. 48 (1952)	1
Mitchell v. *Trawler Racer, Inc.*, 362 U. S. 539	3, 4, 5, 7
McCallister v. *Magnolia Petroleum Company*, 357 U. S. 221	7
Palmer v. *Hoffman*, 318 U. S. 109, 119 rehearing denied 318 U. S. 800	6
Puerto Seguro Cia. Neviara v. *Pettsilos*, 279 F. 2d 599 (4 Cir. 1960)	6, 7
Rotondo v. *Isthmian Steamship Co.*, 243 F. 2d 581 (2d Cir. 1957), certiorari denied 355 U. S. 834	1
United States v. *Atkinson*, 297 U. S. 157 (1936)	6

Rules Cited.

Federal Rules of Civil Procedure,	
Rule 50	1
Rule 50(b)	1
Rule 51	2, 5

Authorty Cited.

Moore's Federal Practice, Volume 5, Chapter 51, pages 2501, 2509	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 977.

BENJAMIN BLIER,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

Petitioner, a ship's purser aboard the *SS American Leader*, was allegedly injured on May 31, 1957, when he claims he stepped on grease while boarding the vessel by means of a sectional gangway which extended from the pier to the main deck of the ship.

Petitioner did not move for a directed verdict at the close of the evidence nor did he move for entry of judgment in his favor, notwithstanding the verdict. Consequently, he admitted that an issue of fact on unseaworthiness existed for the jury's determination. *Johnson* v. *New York N. H. & H. R. Co.*, 344 U. S. 48 (1952); *Rotondo* v. *Isthmian Steamship Co.*, 243 F. 2d 581 (2d Cir. 1957), certiorari denied 355 U. S. 834; Rules 50 and 50(b) of the Federal Rules of Civil Procedure. Also, petitioner did not take exceptions to the

charge given by the court, including the portion of the charge of which he now complains. In sum, the issues were submitted to the jury without appropriate objections by petitioner and a verdict was returned for the respondent.

Moreover, the trial court's charge was proper in all respects. Contrary to petitioner's misstatement (p. 4 of Petition), the trial court submitted to the jury the question of whether the presence of the grease, if it did exist, rendered the vessel unseaworthy and it explained in explicit terms that if a finding of unseaworthiness was made, then respondent's liability "is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that defendant knew that the steps would be used when such grease was on there." (Respondent's Appendix p. 2a).

Furthermore, petitioner did not take appropriate exceptions to any part of the charge as given by the trial court and is, therefore, barred from now asserting a claim of error. (Rule 51 of the Rules of Federal Procedure, discussed p. 5 *infra*). Petitioner argues that the trial court granted him exceptions to its refusal to give further illustrations of unseaworthiness to the jury. But clearly the court's failure to give examples of unseaworthiness beyond the particular facts involved (grease on the steps of the gangway) was justified, and in any event petitioner's exception to this omission certainly does not constitute an exception to the charge actually given and of which petitioner now complains. (Petition p. 8). As to the charge complained of, it is uncontroverted that petitioner took no exception. Indeed, it is conceded on page 9 of petitioner's brief to the Court of Appeals that petitioner's counsel had been lax in not excepting to the charge.

POINT I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THIS COURT'S OPINION IN *Mitchell v. Trawler Racer Inc.* THE TRIAL JUDGE CORRECTLY CHARGED THE JURY ON UNSEAWORTHINESS IN STRICT CONFORMITY WITH THE MITCHELL DECISION, INCLUDING A CHARGE THAT THE DUTY IS AN ABSOLUTE ONE AND DID NOT DEPEND ON DEFENDANT'S NOTICE OF THE GREASE. PETITIONER MADE NO OBJECTION TO THE CHARGE.

The entire charge of the court is set forth in respondent's appendix, *infra* pages 1a to 7a.

Plainly, the court accurately charged the jury on the two theories of recovery, viz. negligence and unseaworthiness, and it pointed out in the fifth paragraph of its charge that one of plaintiff's theories "is that the vessel is what is known in the terms of the law as unseaworthy, due to the claim that there was grease on the steps of the gangway". (Respondent's Appendix 1a).

The court explained in paragraph seventh of its charge what is meant by unseaworthiness as "directed to the present case" (Respondent's Appendix 2a):

> "First I will try to explain to you the term 'unseaworthiness'. The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury."

The court then in paragraphs eighth and ninth applied the law of unseaworthiness to the particular condition alleged, i.e. grease (Respondent's Appendix 2a):

> "In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:
>
> A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put."

And the court in paragraph tenth charged the jury that if unseaworthiness was found because of grease on the gangway defendant's liability was an absolute one (Respondent's Appendix p. 2a):

> "If you do decide that the vessel was unseaworthy, then its liability is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that the defendant knew that the steps would be used when such grease was on there."

The Court of Appeals in affirming the judgment found that the trial court's "instructions to the jury were wholly unexceptionable" and "that they are in strict conformity with the teaching of *Mitchell*" (*Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539). The Court of Appeals pointed out the *Mitchell* case requires that there must be a complete divorcement of unseaworthiness liability from concepts of negligence, i.e. if unseaworthiness is found the shipowner's duty is an absolute one and it is liable regardless of notice. In the instant case, the trial court so charged. (Respondent's Appendix p. 2a).

The Court of Appeals also pointed out that the *Mitchell* case held that the duty of the shipowner is not to furnish

an accident-free ship but only to furnish a vessel and appurtenances reasonably fit for their intended use. Mr. Justice Stewart in delivering the opinion in the *Mitchell* case stated (362 U. S. 539 at page 550):

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin *v.* Lykes Bros. S.S. Co., 348 U. S. 336."

Clearly, therefore, the trial court correctly charged the jury that the "vessel would not be unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable." (Respondent's Appendix p. 2a).

Petitioner makes the illusory argument that the trial court by the mere use of the word "temporary" misguided the jury by suggesting a different standard applied than to a "permanent condition". But the plain fact is that the court by explicit language accurately defined to the jury the applicable standards of unseaworthiness, namely, that the duty is an absolute one, that it does not depend on notice and that the vessel need only be reasonably safe and suitable.

In any event, (although the trial court allowed petitioner exceptions to its failure to give further examples of unseaworthiness) petitioner did not except to the instructions actually given by the trial court including the charge of which petitioner now complains. (Petition page 8).

Rule 51 of the Federal Rules of Civil Procedure which refers to instructions to the jury states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (For discussion, see Moore's Federal Practice, Volume 5, Chapter 51, pages 2501, 2509.)

In *Palmer* v. *Hoffman*, 318 U. S. 109, 119 rehearing denied 318 U. S. 800 and *United States* v. *Atkinson*, 297 U. S. 157 (1936) this Court held that in the absence of exceptional circumstances, error in a jury trial which was not brought to the attention of the trial court by proper exception or request to charge will not be considered on appeal.

POINT II.

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

Petitioner relies on the case *Grzybowski* v. *Arrow Barge Co. Inc.*, 283 F. 2d 481 (4 Cir. 1960), wherein the Court of Appeals for the Fourth Circuit found error. As pointed out by the opinion of the Second Circuit, however, the reason for the reversal in *Grzybowski* was that the trial judge made certain remarks to the jury which failed to measure up to the requirement that unseaworthiness liability be completely divorced from "concepts of negligence".

Petitioner also cites *Puerto Seguro Cia. Neviara* v. *Pettsilos*, 279 F. 2d 599 (4 Cir. 1960). In the *Seguro* case the defendant shipowner argued that a mere transitory condition would not give rise to a cause of action. This was never contended in the instant case nor did Judge

Dimock so charge. In *Seguro* the Court of Appeals for the Fourth Circuit held that liability for a transitory condition is not different from liability that attaches when the condition is permanent. The case clearly follows *Mitchell* and in no way conflicts with the decision below or with the trial judge's charge in the matter before this Court.

Petitioner refers to the case of *McCallister* v. *Magnolia Petroleum Company*, 357 U. S. 221, wherein this Court held that the trial court's instructions implied that plaintiff could recover for unseaworthiness only if the defect rendered the whole vessel unfit for the purpose for which it was intended. No such question is presented in this case.

Conclusion.

There is no unique question of maritime law presented and the issues raised were reviewed and fully dealt with in the decision of the Court of Appeals for the Second Circuit, which denied petitioner's appeal.

There is no basis to petitioner's contention that there is a question of conflict.

Furthermore, the court below properly found that there was no error with respect to the trial judge's charge. In any event, there is no reversible error because of plaintiff's failure to make objection.

The Petition for Writ of Certiorari Should be Denied.

Respectfully submitted,

Louis J. Gusmano,
Counsel for Respondent.

Kirlin, Campbell & Keating,
William R. Mackey,
Of Counsel.

APPENDIX.

Charge of the Court.*

DIMOCK, J.

Ladies and gentlemen, under our system of justice the judge has a function and the jury has a function. It is my duty as judge to instruct you as to the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive function to determine the facts in the case. Just as you cannot encroach on my function, I cannot encroach on yours. You are the sole judges of the facts. It is not what counsel on either side have said, nor what I may say as to what the facts in the case are, but it is your recollection and judgment on the facts that must govern.

With that introduction I will try to describe the case to you.

It is brought by the plaintiff, Benjamin Blier, against the defendant, United States Lines Company. The claim is alleged to arise out of an accident which is said to have occurred while the plaintiff was employed on the S S *American Leader*, owned and operated by the defendant.

The plaintiff seeks to recover for personal injuries that he says he sustained in the course of his employment as a ship's purser and a member of the crew.

This claim is based on two separate theories, either one of which if proved would be sufficient to support a verdict for the plaintiff if the other elements of the case were there. One of these theories is that the vessel is what is known in the terms of the law as unseaworthy, due to the claim that there was grease on the steps of the gangway.

The second theory is the claim that the defendant, acting through its employees, was negligent in failing to remove grease from the steps upon which plaintiff claimed that he slipped and twisted his ankle.

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* Portions of charge concerning defenses and damages omitted.

Charge of the Court.

First I will try to explain to you the term "unseaworthiness". The owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which the plaintiff was making of the ship at the time of his alleged injury.

In considering whether the vessel was unseaworthy due to the presence of grease on the steps of the gangway, the following rules should be followed:

A vessel is not unseaworthy by reason of a temporary condition, if even so the vessel was reasonably safe and suitable. In order to be seaworthy, a vessel need not meet a standard of perfection. It need only be reasonably safe for the purpose to which it is to be put.

If you do decide that the vessel was unseaworthy, then its liability is an absolute one. That is, it does not depend upon any showing that the defendant or its employees knew or had reason to expect that grease was on the steps of the gangway, or that the defendant knew that the steps would be used when such grease was on there. You will remember that the plaintiff also claims recovery on the ground that the defendant was negligent in that its employees failed to remove grease from the steps on which he was allegedly injured.

I shall try to explain to you what the term "negligence" means.

In its relation to the plaintiff the defendant had a duty to exercise through its employees' ordinary care. Ordinary care is that which would be the conduct of a reasonable and prudent person under similar circumstances. It is a breach of that duty of ordinary care if defendant's employees conducted themselves either through action or failure to act in such a manner as to create a risk of injury to the plaintiff which a reasonable and prudent person

would have anticipated and guarded against under similar circumstances.

If you find that acts of employees of the defendant, or failure to act, created a risk of harm to the plaintiff which reasonable persons similarly situated would have anticipated and guarded against, that would mean that you find the defendant negligent.

In this connection you must decide whether any grease which was on the steps had been there long enough so that reasonable persons would have discovered it and removed it.

You are not to guess or to speculate as to whether the ship was unseaworthy or the defendant was negligent, nor can you regard the mere fact of the accident as a basis for finding the defendant responsible. Your determination must be based upon facts or reasonable inferences from facts.

It is important for you to bear in mind that a finding of unseaworthiness of the vessel or negligence of the defendant without more is not enough to hold the defendant liable in damages.

Its liability also depends on whether the unseaworthiness or negligence was a proximate cause of injury. To be a proximate cause there must be a direct causal connection between the unseaworthiness or negligence and the injury. In other words, there must be an unbroken chain of events flowing from the unseaworthiness or negligence and leading to the injury. Assuming that you found the vessel unseaworthy or the defendant negligent, you must then decide whether there was this causal connection between the unseaworthiness or negligence and injury to the plaintiff.

Applying that to the facts of this case, if you find that there was a direct causal connection between plaintiff's broken ankle and an accident for which the defendant was responsible, the broken ankle would be a proximate result of the accident.

Charge of the Court.

The next thing that I will take up with you is the matter of burden of proof. The plaintiff has the burden of proof to establish the essential elements of his claim. Thus, the plaintiff has the burden of proving that the ship was unseaworthy or the defendant was negligent and that any unseaworthiness or negligence of the defendant was a proximate cause of an injury to the plaintiff. If the plaintiff fails to establish that the ship was unseaworthy or that the defendant was negligent and that this was the proximate cause of an injury to the plaintiff, then your verdict must be for the defendant and you need go no farther in your deliberations. But if you do find that the plaintiff has established these matters, the defendant would then have the burden of proof to establish its claim of contributory negligence, which I will discuss with you later.

The party who has the burden of proof on a particular issue must prove by a fair preponderance of the evidence the necessary elements of his claim. This preponderance is determined by your weighing the credible and convincing evidence tending to prove a given element of the claim, and the credible and convincing evidence tending to disprove it. That is done in your mind just as a chemist would weigh two physical substances in a balancing scale. If the evidence tending to prove a particular claim of a party weighs more in your mind than the evidence tending to disprove it, then that party has sustained his burden of proof.

• • • • • •

You are to decide the case from the evidence and the evidence alone, and you are not to be influenced by any assumption, conjecture or any inference not warranted by facts proved to your satisfaction.

Your oath sums up your duty, and that is that you will well and truly try the issues between these parties, without fear or favor to any man, according to the evidence given to you in court and the laws of the United States.

Will counsel approach the bench, please.

Charge of the Court.

(The following took place at the bench without the hearing of the jury:)

The Court: Have you any exceptions?

Mr. Heller: No exceptions, but I just would like to point out will you please elucidate and give some examples of unseaworthiness, that the vessel should provide a safe place to walk, in addition to a safe place to work.

The Court: They would think that the man was working when he was walking.

Mr. Heller: That is the thought that struck me; he was walking to his work.

The Court: I don't think that I ought to add anything further; it seems to me that that is clear enough.

Mr. Heller: What about some examples of unseaworthiness? The jury might be of the opinion that unseaworthiness means only that a ship has not got a good hull or a good mast.

The Court: No. They would know that I would not have submitted the matter to them if there was not a question of unseaworthiness. I will give you an exception to both of your requests.

Mr. Heller: No examples of unseaworthiness?

Mr. Mackey: No exceptions, your Honor.

(The following took place within the hearing of the jury:)

(Marshals sworn.)

The Court: Ladies and gentlemen, it is just about lunch-time and you may well wish to go to lunch before you begin your deliberations. That is entirely within your determination as to whether or not you would prefer to talk a little while before you go to lunch.

Juror No. 8: Could I ask a question of you?

The Court: You can ask a question.

Juror No. 8: In what form will your Honor's charge be made available to us?

Charge of the Court.

The Court: If you need any portion of it, you can come back and tell us or send a note and tell us what portion you would wish and it will be read to you, or if it is unintelligible to you and you are sure that just reading it again is not what you want, formulate a question to the Court and the Court will try to answer that, and that can be done by sending a note to the Court.

You may then go to lunch now and thereafter retire for your deliberations.

(The jury was sent to lunch at 12.55 p. m. and thereafter began its deliberations.)

(The jury returned into the courtroom at 3.45 p. m.)

(Roll call of jurors.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: The jury finds for the defendant, U. S. Lines.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

You say you find in favor of the defendant and so say you all.

(The jury replied in the affirmative.)

The Court: Thank you very much for your services, ladies and gentlemen. For what interest it might have for you, my verdict would have been the same as yours in this case.

I will ask you to be back at 9.00 o'clock tomorrow morning.

The Clerk: Report to Room 109 at 9.00 o'clock tomorrow morning.

(The jury was dismissed.)

Defendant's Requests to Charge.

Mr. Heller: The plaintiff moves to set aside the verdict of the jury as contrary to law and contrary to the evidence.

The Court: Motion denied.

Mr. Heller, you did everything that could be done with your case, I think. I don't think anybody could have won it.

Mr. Mackey: Thank you, your Honor.

(Trial concluded.)